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In the

Supreme Court of the United States

OCTOBER TERM 1961

No. 770

I. B. ADELMAN,

Petitioner,

v.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR EXHIBITOR RESPONDENTS IN OPPOSITION

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This brief in opposition is submitted in behalf of Interstate Circuit, Inc. and Texas Consolidated Theatres, Inc., usually referred to as exhibitor respondents.

QUESTIONS PRESENTED

The questions with which the courts below were confronted, and with which this Court must deal if the writ is granted, are these:

1. Whether relief which was expressly denied upon the trial of the cause, in which no appeal was taken, may be obtained through a petition to modify an equitable decree.

2. Whether, when an issue has been once litigated in the trial of a cause and in effect relitigated upon an earlier modification proceeding, principles of res judicata and estoppel preclude its further litigation.

As will be hereinafter shown, petitioner did not prevail, but on the contrary lost, on the issue which he attempts to relitigate, and thus the phraseology of his first and third "Questions Presented" is incorrect; but the substance of these Questions offers the points set forth above, namely, whether petitioner can, several years after final judgment, attempt through injunction modification proceedings to reverse in part a trial court's judgment from which he did not appeal.

Petitioner's second question improperly assumes that the provisions of the trial court's decree violate the antitrust laws but nevertheless presents only the question as to whether a trial court's determination can be relitigated because (petitioner says) it was not in compliance with law, or whether such a review is denied under principles of finality of judgments, res judicata, and estoppel.

STATEMENT OF THE CASE

Petitioner's suit for treble damages and injunctive relief under the antitrust laws, filed in 1948 and brought to trial in 1955 before the court and a jury, involved basically a charge of monopoly and conspiracy in regard to first-run and second-run motion picture exhibition in Houston, Texas. The complaint involved not just a part of first-run exhibition but all first-run exhibition, as Judge Ingraham observed in his opinion (R. 246).

As the evidence developed in the trial, it became apparent that there was no basis for a charge of violation of the anti-trust laws in connection with that part of first-run exhibition that involved the licensing of pictures to the three big downtown theatres in Houston, namely, the Majestic, Metropolitan and Loew's State. There was no direct evidence anywhere in petitioner's case of express conspiracy and the trial judge so charged the jury (R. 268).

Petitioner's case rested entirely on circumstantial evidence. Such a circumstantial case typically, and in this instance, is based on the inference that where persons do something which is contrary to their apparent best business interests it may be inferred that such was done pursuant to an agreement or understanding. In the instant case, however, the evidence as it developed demonstrated overwhelmingly that the three theatres mentioned were so superior in location, appointments, grossing power and other attributes justifying a first-run, there was no basis for inferring an unlawful conspiracy or a use of monopoly power in the licensing of first-runs to such theatres in preference to petitioner's suburban Delman Theatre. The attorneys for the respondents were aware of this; the trial court became aware of it; and the attorneys who were at that time representing petitioner became aware of it. Petitioner accordingly conceded that he had no case so far as the three big downtown houses were concerned. He did not do this for the first time on the occasion of the review of the proposed charge to the jury as set forth in the record (R. 256-257). He had already done this at an

earlier time, as his counsel's statement mentioned, for counsel remarked:

> "In view of the fact that we have conceded we don't compete with those big three for the pictures, * * *" (R. 256).

This concession of petitioner as to this part of his case pertained to all elements thereof. Since the damage issue was submitted to the jury, this phase of the matter was withdrawn from its consideration by the court:

> "You are instructed that the plaintiff has conceded that he is not entitled to compete for first-run exhibition in the city of Houston against the Loew's State Theatre, the Majestic Theatre, and the Metropolitan Theatre, but does contend that he is entitled to compete for first-run exhibition against the Kirby Theatre and any other theatre operated by the exhibitor defendants" (R. 257).

The judge had in mind this determination of this phase of the litigation so far as the equity matter was concerned, for he commented at the hearing on equitable relief:

> "The Court:
>
> "Was it said upon the trial of this case that the Delman doesn't compete for first-run against Loew's State and the Metropolitan?" (R. 286).

and received an affirmative answer from petitioner's then counsel (R. 286).

The quotations of petitioner, in his Statement of the Case, from findings and conclusions of law of the trial court pertain to that phase of first-run exhibition which did *not* concern the Loew's State, Metropolitan and Majestic. It was only as to this other part of first-run, namely, that relating to

exhibition in the Kirby Theatre, the River Oaks Theatre, and occassionally other houses, that conspiracy was found and equitable relief granted. A comparison of the findings of fact, conclusions of law and decree as submitted by petitioner—with those actually made and entered by the trial court—makes this point completely clear. The memorandum opinion of the trial court below (R. 240-245, *182 F. Supp. 222-223*), develops this point fully.

A little over a year later, in October, 1956, the distributor respondents moved to modify the decree to make clear the right of a distributor to license on a nonexclusive first-run in Houston such features as the distributor desired to offer in that fashion. In this proceeding petitioner, through affidavits (R. 81, 84) and proposal of his counsel (R. 86-87), applied for just such equitable relief as he now seeks, namely, an injunction guaranteeing him a right to compete against the three big houses. The injunctive language which would accomplish this was tendered by petitioner to the court (R. 86-87) but was rejected by the trial judge who granted the relief sought by the distributor but not that sought by petitioner. At that time the Kirby Theatre had already been closed several months (R. 79).

In May, 1958 petitioner filed his instant petition to modify the decree, based on no asserted change in fact other than the closing of the Kirby two years earlier. Sixteen months later in September 1959 petitioner filed his own affidavit in support thereof but otherwise took no steps to support his

position prior to the matter being set (at the instance of distributor respondents) for hearing in early 1960. The trial court below dismissed the petition and the Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons for granting the writ, namely, that the holding below is contrary to the public policy of the antitrust laws and, secondly, that the holding below protects exhibitor respondents from petitioner's first-run competition and thus conflicts in principle with two decisions of the Court of Appeals for the Seventh Circuit. These respondents reply to petitioner's points by developing the reasons for denying the writ under two headings:

1. *The decision below was correct.*

The essence of petitioner's argument, both in the courts below and in this Court, revolves around the contention that upon the showing made at the trial of the case in 1955 he was entitled to relief which he did not get. Four out of six of his points in the Court of Appeals, and the substance of all three questions presented by him to this Court, urge the basic contention that there was an error of law, which may now be redressed, in his having been denied the relief (which he sought then and now seeks) by Judge Cecil in 1955.

In the first place, there was never any error in denying him this relief. He conceded he had no case against the three

big downtown houses, concerning which the relief is sought; the evidence did not justify such relief; and the findings of fact and conclusions of law do not support such relief.

But entirely aside from the merits of this position, the courts below were correct because he has had his day in court —not once but twice. If he was not satisfied with the decree in this respect, he should have appealed. It is no answer for the petitioner to say that he is not concerned with appeal but is following the well recognized procedure of moving to modify an equitable decree because of change in circumstances. He simply is not doing that. When he asserts, as in his first question, that the point at issue is whether exhibitors are entitled to be protected by court decree from petitioner's first-run competition, he is arguing that Judge Cecil's decree —in what it provided and in what it did not provide—is wrong as a matter of law and has been wrong ever since 1955. When he poses the thesis in his second question that provisions of an antitrust decree which are contrary to the public policy of the antitrust laws may be revised several years later through a petition for modification, he is again arguing that the trial court's decree was wrong because contrary to law and should now be corrected. And again when in his third question he suggests that a petitioner who was granted only part of the relief he sought may later obtain the relief to which he was entitled but was denied, he is still contending that there was error in the original decree;

and that basic contention is not altered by an oblique reference to changed circumstances.

No one disputes the general provision that an injunction decree is subject to modification where circumstances require. The point is that petitioner did not seek modification of a decree so as to mold an injunction in such a fashion as is required by changed circumstances in order to grant him relief to which he was entitled; he is seeking, under the guise of modification, a decree granting him relief to which he was not entitled and which was denied him on the basis of the determination of the trial court and his formal confession of judgment.

United States v. Swift & Co., 286 U. S. 106, 52 S. Ct. 460, 76 L. Ed. 999, laid down the historic principle:

> "We are not at liberty to reverse under the guise of readjusting."

The United States Court of Appeals for the Second Circuit, in dealing with an application for a supplemental injunction in *Armstrong v. DeForest Radio Telephone & Telegraph, 10 F. 2d 727*, enunciated the same principle:

> "[Referring to the use of injunction or contempt proceedings] The first thing to be done is to ascertain exactly what was decided according to the opinions filed. As between the parties, whatever was there found is final. The facts as between the parties are not open to further examination, and it is improper to turn either a contempt proceeding or an application for supplemental injunction into an inquiry whether the court was wrong, or whether some hole or omission can be discovered in its opinion."

Furthermore, petitioner has had a second day in court (albeit over the opposition of respondents) on this very point

as to whether he was entitled to a modification of the decree on the basis of the closing of the Kirby Theatre. In the 1956 proceedings initiated by a distributor, petitioner then contended through the affidavit of his right-hand man, Sachs (R. 81) and through his own affidavit (R. 84) that in any modification of the injunction he was entitled to injunctive relief as against the Loew's State, Metropolitan and Majestic Theatres, and he proposed to the court just such a modification (R. 86-87). Though no formal motion was filed in open court, by memorandum petitioner sought the very relief which he now seeks when there had already happened the same, the one, and the only factual change of conditions (namely, the closing of the Kirby Theatre) which he now asserts. This he should not be permitted to do again. As the *Restatement of Judgments*, Section 1, Page 9, states:

> "Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them."

Finally, if it should be assumed that petitioner can relitigate this issue on which he has confessed judgment and on which the trial judge held against him, and if he can again attempt to secure this relief despite his unsuccessful efforts on the same point in 1956, he is confronted with the fact that the one circumstance to which he points as a basis for modification, namely, the closing of the Kirby Theatre, necessarily, unavoidably, and inevitably helped him, rather than

hurt him. Every witness who testified in the case agreed that the Kirby, though a first-run house, occupied a lesser position in the exhibition field than the Loew's State, Metropolitan and Majestic and exhibited product that could not find a place in one of the big houses (R. 47-55). Petitioner in substance alleged the same thing in his complaint (R. 30-31). Since for reasons everyone considered valid each distributor preferred a run in the three houses named, it was only if no run was obtainable in one of them that a first run was sought in the Kirby and other theatres (including always petitioner's Delman pursuant to the injunction). The elimination of the Kirby obviously helped the Delman. The Kirby's production did not go to the three big houses for exhibition; it had already been tendered to them. The Kirby product after its closing was thus available for the Delman and other houses. The statistics show this is exactly what happened (R. 141-229). After the Kirby closed, the Delman began showing more, not fewer, first-run pictures. Its first-run business increased measurably in importance. Petitioner's case, built entirely upon the closing of the Kirby, collapses upon the undisputed showing that his first-run position has improved, not suffered, since that event. Actually, no showing or exhibits are necessary to establish this; mathematics prove it. Subtract one theatre, and the remaining are necessarily better off.

2. *The decision below is not in conflict with any decision of the Court of Appeals for the Seventh Circuit.*

Petitioner does not assert any actual conflict. His contention is that there is a conflict "in principle". He predicates this argument upon the ground that under the terms of

the decree the Delman is "prevented" from competing with the three downtown houses. This just is not so. No theatre of any respondent is protected by any decree. The distributors are free to license their pictures as they choose. To twist a refusal to issue an injunction favoring petitioner's Delman into an injunction protecting other theatres is impossible. There is no quarrel with the holding in *Bigelow v. RKO-Radio Pictures, et al., 162 F. 2d 520*, and *Milwaukee Towne Corp. v. Loew's Inc., 190 F. 2d 561*. They hold that parties are not entitled to be protected by court decree in a preferred playing position. That hasn't happened here, and no exhibitor respondent is given any protection, benefit, or playing position of any kind by the court's decree.

CONCLUSION

There are no adequate reasons either given by petitioner or existing in this case, for granting a writ.

As provided in Rule 19 of the Supreme Court Rules, a review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Petitioner refers to the public policy of the antitrust laws but in no way develops how such an issue is involved in the courts refusing him a rehearing on a matter already twice considered. No contention is made that the Court of Appeals decided an important question of federal law or that this decision has conflicted with applicable decisions of this Court, nor that its decision is such a departure as to call for an exercise of this

Court's power of supervision; nor has petitioner shown any conflict, as a matter of principle or otherwise, with the decision of other courts of appeal. The petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this brief were upon the 22 day of March, 1962, mailed with proper postage prepaid to Thomas C. McConnell and Francis J. McConnell, 134 South LaSalle Street, Chicago, Illinois, counsel for petitioner, and to William R. Brown and Baker, Botts, Shepherd & Coates, 16th Floor Esperson Building, Houston 2, Texas, and Donovan, Leisure, Newton & Irvine, Two Wall Street, New York 5, New York, counsel for distributor respondents.

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